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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

8 TRINA THOMAS,

9 Plaintiff,

10 vs.

11 NANCY A. BERRYHILL,  
12 Acting Commissioner of Social  
Security,

13 Defendant.  
14

No. 2:16-CV-00148-LRS

**ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT,  
INTER ALIA**

15 **BEFORE THE COURT** are the Plaintiff's Motion For Summary Judgment  
16 (ECF No. 16) and the Defendant's Motion For Summary Judgment (ECF No. 20).  
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18 **JURISDICTION**

19 Trina Thomas, Plaintiff, applied for Title XVI Supplemental Security Income  
20 benefits (SSI) on January 16, 2013. The application was denied initially and on  
21 reconsideration. Plaintiff timely requested a hearing which was held on April 7,  
22 2014, before Administrative Law Judge (ALJ) James W. Sherry. Plaintiff testified  
23 at the hearing, as did Vocational Expert (VE) Trevor Duncan. On June 16, 2014, the  
24 ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied  
25 a request for review of the ALJ's decision, making that decision the Commissioner's  
26 final decision subject to judicial review. The Commissioner's final decision is  
27 appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).  
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**ORDER GRANTING PLAINTIFF'S  
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1 A decision supported by substantial evidence will still be set aside if the proper  
2 legal standards were not applied in weighing the evidence and making the decision.  
3 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.  
4 1987).

## 6 ISSUES

7 Plaintiff argues the ALJ erred in: 1) failing to fully and fairly develop the  
8 record; 2) rejecting Plaintiff's symptom testimony; and 3) rejecting the request to  
9 reopen Plaintiff's prior application for SSI benefits.

## 11 DISCUSSION

### 12 SEQUENTIAL EVALUATION PROCESS

13 The Social Security Act defines "disability" as the "inability to engage in any  
14 substantial gainful activity by reason of any medically determinable physical or  
15 mental impairment which can be expected to result in death or which has lasted or can  
16 be expected to last for a continuous period of not less than twelve months." 42  
17 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be determined  
18 to be under a disability only if her impairments are of such severity that the claimant  
19 is not only unable to do her previous work but cannot, considering her age, education  
20 and work experiences, engage in any other substantial gainful work which exists in  
21 the national economy. *Id.*

22 The Commissioner has established a five-step sequential evaluation process for  
23 determining whether a person is disabled. 20 C.F.R. § 416.920; *Bowen v. Yuckert*,  
24 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines if she is engaged  
25 in substantial gainful activities. If she is, benefits are denied. 20 C.F.R. §  
26 416.920(a)(4)(I). If she is not, the decision-maker proceeds to step two, which  
27 determines whether the claimant has a medically severe impairment or combination  
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1 of impairments. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant does not have a severe  
2 impairment or combination of impairments, the disability claim is denied. If the  
3 impairment is severe, the evaluation proceeds to the third step, which compares the  
4 claimant's impairment with a number of listed impairments acknowledged by the  
5 Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R.  
6 § 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or  
7 equals one of the listed impairments, the claimant is conclusively presumed to be  
8 disabled. If the impairment is not one conclusively presumed to be disabling, the  
9 evaluation proceeds to the fourth step which determines whether the impairment  
10 prevents the claimant from performing work she has performed in the past. If the  
11 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §  
12 416.920(a)(4)(iv). If the claimant cannot perform this work, the fifth and final step  
13 in the process determines whether she is able to perform other work in the national  
14 economy in view of her age, education and work experience. 20 C.F.R. §  
15 416.920(a)(4)(v).

16 The initial burden of proof rests upon the claimant to establish a prima facie  
17 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th  
18 Cir. 1971). The initial burden is met once a claimant establishes that a physical or  
19 mental impairment prevents her from engaging in her previous occupation. The  
20 burden then shifts to the Commissioner to show (1) that the claimant can perform  
21 other substantial gainful activity and (2) that a "significant number of jobs exist in the  
22 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,  
23 1498 (9th Cir. 1984).

## 24 25 **ALJ'S FINDINGS**

26 The ALJ found the following: 1) Plaintiff has a "severe" medical impairment,  
27 that being mild lumbar degenerative disk disease; 2) Plaintiff's impairment does not  
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## **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT- 4**

1 meet or equal any of the impairments listed in 20 C.F.R. § 404 Subpart P, App. 1; 3)  
2 Plaintiff has the residual functional capacity (RFC) to perform light work as defined  
3 in 20 C.F.R. § 416.967(b), with the following additional limitations: she can sit,  
4 stand, or walk for about six hours in an eight hour day; she can perform unlimited  
5 pushing or pulling within these lifting restrictions; she can occasionally climb  
6 ladders, ropes or scaffolds; she can occasionally stoop and crouch; and she can  
7 frequently kneel; and 4) Plaintiff's RFC allows her to perform her past relevant work  
8 as a server/waitress. Accordingly, the ALJ concluded the Plaintiff is not disabled.  
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#### 10 **DUTY TO DEVELOP RECORD**

11 The ALJ has a basic duty to inform himself about facts relevant to his decision.  
12 *Heckler v. Campbell*, 461 U.S. 458, 471 n. 1, 103 S.Ct. 1952 (1983). The ALJ's duty  
13 to develop the record exists even when the claimant is represented by counsel.  
14 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9<sup>th</sup> Cir. 2001). The duty is triggered by  
15 ambiguous or inadequate evidence in the record and a specific finding of ambiguity  
16 or inadequacy by the ALJ is not necessary. *McLeod v. Astrue*, 640 F.3d 881, 885 (9<sup>th</sup>  
17 Cir. 2011).

18 Plaintiff contends the ALJ erred in failing to order testing to ascertain whether  
19 she has a "severe" cognitive impairment, that being either an intellectual disability

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28 **ORDER GRANTING PLAINTIFF'S  
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1 and/or a learning disability.<sup>1</sup> Plaintiff did not allege a cognitive impairment in either  
2 of her applications for SSI benefits.<sup>2</sup> The current medical record contains no  
3 reference to a possible cognitive impairment. Instead, at the April 7, 2014 hearing,  
4 Plaintiff's counsel requested "IQ testing" based on the fact Plaintiff had not obtained  
5 her GED (General Educational Development) certificate and had attended special  
6 education classes. (AR at p. 45). Plaintiff testified the highest grade she achieved in  
7 school was the seventh grade and that she was working on obtaining her GED. She  
8 testified she has difficulty with reading, writing and math, and took special education

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16 <sup>1</sup> "Intellectual disability," formerly known as mental retardation, is a  
17 condition that causes significantly impaired cognitive functioning from birth or  
18 early infancy. A "learning disability" is a neurologically-based disorder that  
19 occurs when an individual has difficulty interpreting or processing what he or she  
20 sees or hears. Such an individual has difficulties in specific areas of academic  
21 achievement. A learning disability can occur across a range of intellectual ability.  
22 [http://www.differencebetween.com/difference-between-learning-disability-and-vs-](http://www.differencebetween.com/difference-between-learning-disability-and-vs-intellectual-disability/)  
23 [intellectual-disability/](http://www.differencebetween.com/difference-between-learning-disability-and-vs-intellectual-disability/)

24 <sup>2</sup> In addition to the application she filed on January 16, 2013, alleging her  
25 disability began on December 22, 2001 (AR at pp. 170-73), she filed an  
26 application on June 14, 2011, alleging her disability began on January 1, 2005.  
27 (AR at pp. 164-69).

28 **ORDER GRANTING PLAINTIFF'S**  
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1 classes in school on those subjects. (AR at pp. 48-51).<sup>3</sup> According to Plaintiff, she  
2 has been working for the past three years on obtaining her GED. She has not actually  
3 taken the test, but has been practicing for it. Plaintiff testified she does not have a  
4 driver's license, although she tried to get one and failed the written test. (AR at pp.  
5 51-53). Plaintiff testified she does not have any friends and that she was picked on  
6 because she attended special education classes. (AR at p. 63). She testified that she  
7 had some trouble with her job as a server/waitress because she got confused regarding  
8 orders. (AR at p. 72).

9 In a letter dated April 22, 2014, two weeks after the hearing, Plaintiff's counsel  
10 asked the ALJ to again consider ordering a consultative examination to determine if  
11 Plaintiff suffers from "cognitive impairments and intellectual deficits." (AR at p.  
12 223). Counsel included a written statement from Diana Toulou, Plaintiff's GED  
13 instructor "off and on throughout the past 4-5 years," which detailed her observations  
14 of Plaintiff's "learning difficulties" in reading, writing, and math. For example, Ms.  
15 Toulou indicated Plaintiff could read at a third grade level "with support and tutoring  
16 throughout the process." Ms. Toulou acknowledged she was not qualified to

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20 <sup>3</sup> In January 2013, it appears the Plaintiff's attorney at the time answered  
21 questions on her behalf in conjunction with the filing of her application for SSI  
22 benefits. The "Disability Report" indicates there was "[n]o contact with the  
23 claimant" and refers to "ATTY I3368." (AR at p. 184). With regard to  
24 "Education and Training Information," the report indicates Plaintiff completed a  
25 GED in 2000 and she did not attend special education classes. (AR at p. 188).  
26 Obviously, this is contrary to what Plaintiff testified to at the hearing, but these  
27 answers were not supplied directly by the Plaintiff and it is unknown whether she  
28 supplied such information to her attorney at the time.

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1 diagnose Plaintiff with a learning disability, but could only share what she had seen  
2 while working with the Plaintiff in the classroom. (AR at p. 224).

3 In his decision, the ALJ indicated he had reviewed and considered the  
4 statement of Ms. Toulou and found it was insufficient to establish Plaintiff had a  
5 medically determinable “learning disorder” as such a diagnosis was not documented  
6 by acceptable clinical or laboratory findings. (AR at p. 24). Plaintiff does not dispute  
7 that Ms. Toulou’s statement does not constitute acceptable clinical or laboratory  
8 findings, but notes that the very purpose of the requested cognitive testing was to  
9 determine if such a diagnosis could be documented.<sup>4</sup>

10 This court concludes that the statement of Ms. Toulou, in addition to Plaintiff’s  
11 testimony about her learning difficulties, was sufficient to trigger a duty on the part  
12 of the ALJ to develop the record to ascertain whether Plaintiff suffers from a “severe”  
13 medically determinable learning disability and beyond that, whether she may even  
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15 <sup>4</sup> A “severe” impairment is one which significantly limits physical or mental  
16 ability to do basic work-related activities. 20 C.F.R. § 416.920(c). It must result  
17 from anatomical, physiological, or psychological abnormalities which can be  
18 shown by medically acceptable clinical and laboratory diagnostic techniques. It  
19 must be established by medical evidence consisting of signs, symptoms, and  
20 laboratory findings, not just the claimant's statement of symptoms. 20 C.F.R. §  
21 416.908. "Basic work activities" are the abilities and aptitudes to do most jobs,  
22 including: 1) physical functions such as walking, standing, sitting, lifting, pushing,  
23 pulling, reaching, carrying, or handling; 2) capacities for seeing, hearing, and  
24 speaking; 3) understanding, carrying out, and remembering simple instructions; 4)  
25 use of judgment; 5) responding appropriately to supervision, co-workers and usual  
26 work situations; and 6) dealing with changes in a routine work setting. 20 C.F.R.  
27 § 416.921(b).  
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1 suffer from an intellectual disability meeting or equivalent to Section 12.05  
2 (“Intellectual Disability”) of the Listing of Impairments. 20 C.F.R. § 404 Subpart P,  
3 App. 1.<sup>5</sup> The record was inadequate to allow for proper evaluation of the evidence.  
4 (Ms. Toulou’s statement; Plaintiff’s testimony) and allow the ALJ to conclude  
5 Plaintiff does not have a severe “learning disorder.” *Mayes v. Massanari*, 276 F.3d  
6 453, 460 (9<sup>th</sup> Cir. 2001). The record taken as a whole was inadequate to answer that  
7 question.

8 On remand, the ALJ will order a consultative psychological examination which  
9 will include IQ testing to determine whether Plaintiff has a “severe” intellectual  
10 disability that may meet or equal Listing 12.05, and testing to determine whether  
11 Plaintiff suffers from a “severe” learning disability which significantly limits her  
12 ability to perform basic work-related activities including understanding, carrying out,  
13 and remembering simple instructions, use of judgment, responding appropriately to  
14 supervision, co-workers and usual work situations, and dealing with changes in a

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21 <sup>5</sup> In *Reed v. Berryhill*, 2017 WL 684154 at \*4 (W.D. Wash.), the court  
22 found that evidence the plaintiff attended special education classes, did not  
23 graduate from high school, and had been unable to obtain a GED, potentially  
24 constituted evidence plaintiff had “deficits in adaptive functioning initially  
25 manifested during the developmental period,” as set forth in the introductory  
26 paragraph of Listing 12.05. The “developmental period” is the period before age  
27 22.

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1 routine work setting.<sup>6</sup> If the ALJ finds there is a “severe” intellectual disability that  
2 does not meet or equal Listing 12.05, and/or finds there is a “severe” learning  
3 disability, he or she shall make a new RFC finding and conduct a new analysis at step  
4 four and, if necessary, at step five of the sequential evaluation process.<sup>7</sup>

## 5 6 **REOPENING**

7 At the April 7, 2014 hearing, the ALJ himself suggested Plaintiff’s prior  
8 application, dated June 14, 2011, could be reopened. (AR at p. 43). Plaintiff’s  
9 counsel formally requested such reopening and the ALJ remarked he would “focus[]  
10 on June 14, 2011 for disability purposes,” advising Plaintiff the reason was that  
11 “benefits can only begin from the date of an application that is subject to my  
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13 <sup>6</sup> Although the ALJ did not find the presence of a “severe” learning  
14 disability and included no mental limitations in his RFC, it is true that he  
15 presented the VE with a hypothetical that included certain mental health  
16 restrictions in the work place. The VE opined that the addition of those  
17 restrictions would not alter his conclusion that Plaintiff was capable of performing  
18 her past relevant work or other work in the national economy, regardless of  
19 whether her physical RFC was limited to “light” work or “sedentary” work. (AR  
20 at pp. 73-76). Nevertheless, without further development of the record, the true  
21 extent of the “severity” of any learning disability and/or intellectual disability is  
22 unknown.

23 <sup>7</sup> Plaintiff’s contention that the ALJ improperly rejected her physical  
24 symptoms testimony is preserved for further appeal, if necessary. The court, at  
25 this time, makes no determination regarding Plaintiff’s credibility and that is an  
26 issue which the ALJ, on remand, may further address in light of new evidence  
27 presented regarding Plaintiff’s mental limitations.

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1 reopening, which is your prior application of 2011, so that's why we look at that date  
2 forward, even though some of your issues may exist prior to that date." (AR at p.  
3 44). Although seemingly having reopened Plaintiff's prior application, in his  
4 subsequent written decision, the ALJ denied the Plaintiff's request to reopen "as  
5 discussed more fully below" (AR at p. 21) and found Plaintiff had not been under a  
6 disability since January 16, 2013, the date the second application was filed. (AR at  
7 p. 28). As Plaintiff notes, however, there was in fact no discussion by the ALJ why  
8 he denied reopening of the prior application.

9 In her summary judgment motion, the Commissioner appears to concede that  
10 the ALJ considered "on the merits" the issue of Plaintiff's disability during the  
11 already-adjudicated period (June 14, 2011 to January 16, 2013), and therefore, he *de*  
12 *facto* reopened Plaintiff's prior application. (ECF No. 20 at pp. 13-14). The  
13 Commissioner asserts, however, that reopening is of no practical consequence  
14 because Plaintiff alleged the same basis of disability pursuant to both applications  
15 (back pain), the ALJ considered an earlier onset date in her second application  
16 (December 22, 2001) than in her first application (January 1, 2005), the same  
17 evidence considered pursuant to the first application was considered pursuant to the  
18 second application, and the ALJ did not apply a presumption of continuing non-  
19 disability based upon the prior determination denying the first application.

20 Because of this court's finding that the ALJ had a duty to develop the record,  
21 the ALJ's *de facto* reopening has consequences in that on remand, the ALJ will have  
22 to consider mental and/or physical disability from the date of Plaintiff's initial  
23 application (June 14, 2011), instead of her second application (January 16, 2013).  
24 Evidence of intellectual and/or learning disability is relevant to the period from June  
25 14, 2011 onward.

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28 **ORDER GRANTING PLAINTIFF'S  
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1 **CONCLUSION**

2 Plaintiff's Motion For Summary Judgment (ECF No. 16) is **GRANTED** and  
3 Defendant's Motion For Summary Judgment (ECF No. 20) is **DENIED**. The  
4 Commissioner's decision is **REVERSED** and pursuant to sentence four of 42 U.S.C.  
5 §405(g), this matter is **REMANDED** to the Commissioner for additional proceedings  
6 and findings consistent with this order. An application for attorney fees may be filed  
7 by separate motion.

8 **IT IS SO ORDERED.** The District Executive shall enter judgment  
9 accordingly and forward copies of the judgment and this order to counsel of record.

10 **DATED** this 30<sup>th</sup> day of August, 2017.

11 *s/Lonny R. Suko*

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LONNY R. SUKO  
14 Senior United States District Judge

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